Supreme Court, U. S.
FILED
APR 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REHEARING

HERBERT H. DAVIS
Prosecuting Attorney for Benton County

CURTIS LUDWIG
Deputy Prosecuting Attorney for Benton County

P.O. Box 510
Prosser, Washington 99350

Counsel for Respondent

SUBJECT INDEX

	Page
Petition for Rehearing	1-11
Reasons for Granting Rehearing and Restoring Case to Docket for Argument	1-10
I. Section 9.68.010 of the Revised Code of Washington Gives Fair Notice as to the Nature of the Criminal Liability Which Attaches to the Statute	2-7
II. The Language Employed in the Per Curiam Opinion is Such as is Certain to Undermine Rudimentary Law Enforcement Principles in the Obscenity Area.	7-10
Conclusion	10-11

TABLE OF AUTHORITIES CITED

CASES

A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Atty General of Mass., 383 U.S. 413, 86 S. Ct. 975, 16 L.Ed.2d 1	7-9
Cohen v. State, 125 So.2d 560 (Fla. 1960)	7
Demetropolos v. Commonwealth of Mass., 342 Mass. 658, 175 N.E.2d 259 (1961).	7
Ginzburgh, Ralph v. U. S., 383 U.S. 463, 86 S. Ct. 942, 16 L.Ed.2d 31	7-10
Louisiana v. Roufa, 241 La. 474, 129 So.2d 743 (1961)	7
Mishkin v. New York, 383 U.S. 502, 86 S. Ct. 958, 16 L.Ed.2d 56 (Mar. 21, 1966)	3, 7, 8, 10
People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470 (1961) cert. den. 371 U.S. 863, 83 S.Ct. 116, 9 L.Ed.2d 100 (Oct. 15, 1962)	7
Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 217, 4 L.Ed.2d 205, (Dec. 13, 1969)	6, 7
State v. Chobot, 12 Wisc. 2d 110, 106 N.W.2d 286 (1960), Appeal Dis. for Want of Substl. Fed. Question, 386 U.S. 15, 82 S.Ct. 136, 7 L.Ed.2d 85 (1961).	7
State v. Hudson County News, 35 N.J. 284; 173 A.2d 20 (1961)	7

TABLE OF AUTHORITIES CITED - CONT'D

CASES - CONTINUED

State v. Jackson,
224 Ore. 337, 356 P.2d 195 (1960) 7

State v. Locks,
91 Ariz. 394, 372 P.2d 723 (1962) 7

State v. Miller,
112 S.E.2d 472 (1960) 7

State v. Oman,
261 Minn. 10, 110 N.W.2d 514 (1961) 7

State of Washington ex rel Lally v. Gump,
157 Wash. Dec. 116, 356 P.2d 289 (Oct. 27, 1960). 6

U. S. v. Roth and California v. Alberts,
354 U.S. 476, 491, 1 L.Ed.2d 1498,
77 S. Ct. 1304 (June 24, 1957)... 3

Washington v. Rabe,
484 P.2d 917, 921 4

Washington v. Silverman,
292 P.2d 868, 871 (Jan. 19, 1956) 2

STATUTES

Revised Code of Washington, Sect. 9.68.010 . . . . 2, 7-8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITIONER FOR REHEARING

Respondent, State of Washington, prays that a rehearing be granted of this Court's decision of March 20, 1972, reversing the judgment of the Supreme Court of Washington in the above-entitled case, in order that (1) the Court as a whole may re-examine the soundness of its holding that the Washington Statute did not give the defendant, "fair notice," regarding the nature of the criminal liability which was attached to the statute, and (2) so that the individual Justices might reconsider their acceptance of a "per curiam" opinion which reasonably can be expected to underming rudimentary law enforcement principles in the obscenity area.

REASONS FOR GRANTING REHEARING

AND RESTORING CASE TO DOCKET

FOR ARGUMENT

I.

SECTION 9.68.010 OF THE REVISED CODE OF WASHINGTON GIVES FAIR NOTICE AS TO THE NATURE OF THE CRIMINAL LIABILITY WHICH ATTACHES TO THE STATUTE.

In 1961, the Washington Legislature amended R.C.W. Section 9.68.010 to read as follows:

"9.68.010 Obscene literature, Shows, etc. Every person who -

"(1) Having knowledge of the contents thereof shall exhibit . . . any . . . motion picture film . . . picture . . . image, or any object or thing which is obscene . . . . Shall be guilty of a gross misdemeanor." (Our emphasis.)

In view of the choice of language employed by the Legislature, it is difficult for Respondent to understand how Rabe can deny that the language of the statute gives fair notice, consistent with due process. The proscription set by the State Legislature was as to the public exhibition of "any picture" which is obscene and "any image" which is obscene. A more precisely defined limitation can hardly be imagined. Nor is the right of the State Legislature "to make each stick in a faggot a single criminal unit" open to serious question. See Washington v. Silverman, 292 P.2d 868, 871 (Jan. 19, 1956). Certainly Rabe cannot for a moment claim that he does not understand what the State Legislature meant when it used the term "obscene." That legislative body, in 1961, had every right to rely on this Court's judgments in such matters. That type of argument was foreclosed to Rabe by this Court's ruling in U.S. v. Roth

and California v. Alberts, 354 U.S. 476, 491, 1 L. Ed.2d 1498, 77 S. Ct. 1304 (June 24, 1957), decided four years before the adoption of R.C.W. 9.68.010 in its amended form. Further, that same claim of "vagueness" was made to this Court and again squarely rejected in Mishkin v. New York, 383 U.S. 502, 16 L. Ed.2d 56, 60, 86 S. Ct. 958 (Mar. 21, 1966) - five years after the statute was amended, and just two years before Rabe made his decision to exhibit "Carmen Baby" at the open air drive-in theater.

Stripping the case of the smoke screen laid by Petitioner's straw-man arguments and getting down to the bare essentials, we find a fact situation wherein a law enforcement officer, located on public property, observes "pictures" and "images" of copulation, fellatio, cunnilingus, and lesbian acts being projected on a public screen, in larger than life size. He also observes that these exhibitions are being broadcast indiscriminately to everyone else's view in the immediate area. The following day he seeks the counsel of the city attorney, and that evening, the officer and the city attorney view the same "pictures" and "images". On both occasions, they note that others are also observing the public screenings of "pictures" and "images" from outside the drive-in private property. The sergeant thereafter appears before a justice of the peace (who is also a lawyer) to whom he relates the nature of the "pictures" and "images" which he has observed, for the purposes of obtaining an arrest warrant. Can there be any question in the minds of the Justices on this Court that, in this context, the "exhibitions" violated the plain language statutory proscription which made illegal

the public exhibition of "pictures" which were obscene and the public exhibition of "images" which were obscene. What rational rule of law would require any off-the-scene, unwilling viewer to "stick around" and view the entire show so that he might be able to analyze the "dominant theme" for the purpose of satisfaying himself that the "images" and "pictures" which he instinctively judged to be obscene were really not obscene when "taken as a whole?" The statute doesn't require it, nor did the trial or the Washington Supreme Court require it under the circumstances of the case.

Respondent submits that this Court has failed to recognize that Rabe has created a straw man from which to argue, while at the same time misleading this Court as to the real basis for the ruling of the Washington Supreme Court. The core of the Washington Supreme Court ruling is found in the following language of the Court reported in Washington v. Rabe, 484 P.2d 917, at 921, which, at the same time, exposes the straw man created by Rabe:

> "Defendant next argues that the trial court's conclusion of law that 'individual portions or scenes of the movie "Carmen Baby" are obscene and to passing motorists or persons and residents outside the theater those individual scenes become a movie by themselves' is not legally sufficient under existing United States Supreme Court decisions to support the judgment of obscenity.
>
> "Considering the facts before us . . . we conclude otherwise." (Our emphasis.)

Rabe's straw-man argument is that the Washington Judic-

iary cannot interpret the statute to mean what it says, (i.e., to proscribe the exhibition of individual pictures or images which are obscene, because this Court's prior rulings will not permit such an interpretation.) The answer of the Washington Supreme Court was simple and direct, namely, that it did not so interpret this Court to have applied a restriction which would prevent the Court from utilizing the plain language of the statute and applying it according to its literal terms. This, of course, is just the opposite of what this Court says the Washington Supreme Court has done.

It must be emphasized here that the fundamental issue was not as to the straw man created by Rabe (whether the Washington Supreme Court's interpretation of this Court's most recent obscenity pronouncements was correct or not.) The fundamental issue was whether the conduct of Rabe in exhibiting individual scenes of fellatio, cunnilingus, lesbianism, etc., in the manner that he did came within the proscription of the statutory language which outlawed the exhibition f . . . motion picture films . . . pictures . . . and images which were obscene.

Consider, in the face of the above simple but clearly drawn statute, the nature of Rabe's argument to this Court. First of all, Rabe cannot deny that he had knowledge of "Carmen Baby's" contents, which means that he was aware he was projecting onto his drive-in screen "pictures" and "images" bigger than life which "were visible from afar" - pictures and images which trial Judge Yencopal describes as, "fondling of the breast," "fondling of the policeman's genitals," "orally copulating the policeman," etc. In the face of the

above hard facts, Rabe cleverly glosses over the legislative intent and specific language of the statute and, neglecting the outright proscription against "pictures" and "images" which are obscene, focusses his attention on the terminology, "motion picture film" with the undisguised aim of bringing himself within the shelter of a "dominant theme" and "taken as a whole" defense. While admitting at page 23 of his brief that the film was visible from afar, he nevertheless denies that the State Legislature has expressed any value judgment regarding the right to be free from offensive "displays." In the face of the plain language of the statutory proscription against "pictures" and "images" he argues at page 25:

> "Yet the occupants of houses in the vicinity would obviously have but a silent view of a distant screen, and would watch the images thereon, beyond an occasional glimpse, only to the extent that they chose to do so."
> (Our emphasis.)

Respondent submits that, contrary to the assertions made by Rabe, such arguments are not a confession and avoidance defense which is recognized by the law.

It bears recognition here that the past performance of the Washington Supreme Court in the obscenity area does not reveal a history of "reading" into obscenity legislation language which is not present in the statute, See State of Washington ex rel Lally v. Gump, 157 Wash. Dec. 116, 356 P.2d 289 (Oct. 27, 1960), which ruled that the prior statute was unconstitutional under this Court's decision in Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 217, 4 L.Ed.2d 205 (Dec. 14, 1959) for failure to provide a "mens rea" element. Compare,

in this regard, the action of other state courts which read "scienter" into the state statute to avoid law enforcement problems created by the Smith decision: Cohen v. State, 125 So.2d 560 (Fla. 1960); State v. Jackson, 224 Ore. 337, 356 P.2d 195 (1960); State v. Miller, 112 S.E.2d 472 (1960); State v. Chobot, 12 Wisc. 2d 110, 106 N.W.2d 286 (1960), appeal dismissed for want of a substantial federal question, 368 U.S. 15, 82 S.Ct. 136, 7 L.Ed.2d 85 (1961); Louisiana v. Roufa, 241 La. 474, 129 So.2d 743 (1961); Demetropolos v. Commonwealth of Mass., 342 Mass. 658, 175 N.E.2d 259 (1961); State v. Oman, 261 Minn. 10, 110 N.W.2d 514 (1961); State v. Hudson County News, 35 N.J. 284, 173 A.2d 20 (1961); People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470 (1961), cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L.Ed.2d 100 (Oct. 15, 1962); State v. Locks, 91 Ariz. 394, 372 P.2d 724 (1962).

II.

THE LANGUAGE EMPLOYED IN THE PER CURIAM OPINION IS SUCH AS IS CERTAIN TO UNDERMINE RUDIMENTARY LAW ENFORCEMENT PRINCIPLES IN THE OBSCENITY AREA.

The language of the per curiam opinion underminds the entire structure of the obscenity law and casts in doubt what this Court's decisions in A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Mass., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed.2d 1; Ginzburg v. U. S. , 383 U.S. 463, 86 S. Ct. 942, 16 L.Ed.2d 31; Mishkin v. N.Y.,383 U.S. 502, 86 S. Ct. 958, 16 L.Ed.2d 56 (1966) are supposed to mean.

R.C.W. 9.68.010 provides very simply that any person who with knowledge of the contents exhibits any

motion picture film . . . picture . . . image, or any object or thing which is obscene is guilty of a misdemeanor. In interpreting that statute in the light of this Court's rulings in obscenity cases, the Washington Supreme Court held at page 922:

> "However, we find that 'Carmen Baby' is obscene, when we consider, as the trial court did, the context of its exhibition."

The Washington Supreme Court's use of the underscored word "context" is explained on the same page as follows:

> "In adopting what has been termed a 'contextual' or 'variable' approach, the Court drew on the concurring opinion of Chief Justice Warren in Roth . . . ."

In referring to this Court's decision in A Book Named John Cleland's Memoirs of a Woman of Pleasure, supra, Ginzburg, supra, and Mishkin, supra, the Washington Supreme Court stated at page 923:

> "In these three cases, the court offered a flexible 'contextual' analysis to supplement to strict definitional requirements of Roth."

It is crystal clear from this language that the Washington Supreme Court was applying the same "variable" approach employed by the United States Supreme Court when it decided Ginzburg v. U.S. In Rabe, however, this Court now holds:

> "The statute under which petitioner was prosecuted, however, made no mention that the 'context' or location of the exhibition was an element of the offense somehow modifying the word 'obscene.' Petitioner's conviction was

thus affirmed under a statute with a meaning quite different from the one he was charged with violating."

If this is so, why then did Ralph Ginzburg go to prison? See Ralph Ginzburg v. U.S., 383 U.S. 463, 16 L. Ed. 2d 31, 86 S.Ct. 942; rehrg. den. 384 U.S. 934, 16 L. Ed. 2d 536, 86 S. Ct. 1440, and Ralph Ginzburg v. U.S., 436 F.2d 1386, pet'n for cert. to the U.S. Court of Appeals, 3rd Circuit, denied in 402 U.S. 976, 29 L. Ed. 2d 709, ___ S.Ct. ___, rehrg. den. 404 U.S. 875, 30 L. Ed.2d 121, __ S.Ct.___ (Oct. 12, 1971).

The language of this Court in Ginzburg v. U.S., supra, is unmistakably in point. At page 35 this Court said:

"We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise."

At footnote 6 this Court noted in the Ginzburg case:

"It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the trial court admitted evidence, otherwise relevant, toward that end."

The same result was reached in the Mishkin case. At page 62, this Court held:

> "We adjust the prurient appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group . . . ."

Likewise, in Memoirs, this Court noted, at page 5:

> "Neither side availed itself of the opportunity provided by the section to introduce evidence 'as to the nature and form of its publication, advertisement and distribution'."

If the approach employed in the State of Washington is now to be regarded as a vice, why should not the state case have been sent back for retrial as footnote 6 suggests? Respondent has great difficulty in interpreting the language of this Court when it says, "The statute so construed, is impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability is dependent upon the place where the film is shown." Does this Court's comment at footnote 6 of Ginzburg mean that a variable standard is now an accomplished fact since the statute has been given a judicial gloss in Rabe?

CONCLUSION

Respondent, in seeking a rehearing herein, would respectfully submit to the Court that, while the trial facts of this case are of relative unimportance, the language employed by this Court in the per curiam opinion elevates the entire matter to one of monumental significance. This Court has in one short opinion undermined the longstanding precedent that the word "obscene" is not vague, and has,

at the same time, cast into considerable doubt the fundamental rule of obscenity law which makes the conduct of the actor a matter of primary importance. Respondent submits that a rehearing should be granted to permit further argument on the issues raised herein, or in the alternative, that the Court's opinion should be recalled and the petition for writ of certiorari dismissed as improvidently granted.

Respectfully submitted,

HERBERT H. DAVIS,
Prosecuting Attorney

CURTIS LUDWIG, Deputy
Prosecuting Attorney

Counsel for Respondent